

## Restructuring and Insolvency Jurisdiction Guide: BVI

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### Domestic Procedures

	<ul style="list-style-type: none"><li>• liquidation: insolvent, voluntary or compulsory</li><li>• creditors' Arrangement</li><li>• scheme of Arrangement</li></ul>

### **Compulsory liquidation**

- application by: the company; a creditor; a member; the supervisor of an arrangement; the FSC; or the Attorney General
- potential grounds are: the company is insolvent; the Court considers it just
- and equitable; or that it is in the public interest
- a company is insolvent where:

i) it fails to comply with, or set aside, a statutory demand

ii) execution or process of a judgment, decree or order is returned unsatisfied

iii) the company is unable to pay its debts as they fall due; or

iv) the value of its liabilities exceeds that of its assets

- the application must be served at least 14 days before the hearing and is typically heard on specified Liquidation Days (usually one or two Mondays per month)
- it must be advertised (in the BMI and in any jurisdiction appropriate to bring it to the attention of creditors) not less than 7 days after service and not less than 7 days before the hearing
- the application must be determined within 6 months of issuing unless, before then, an extension is granted

### **Insolvent voluntary liquidation**

Resolution of 75% of the members (unless the M&As require a higher %); the prior written consent of a BMI licenced IP; and no pending application before the Court to appoint a liquidator.

### **Creditors' Arrangement**

The company must be insolvent and a 75% majority by value of creditors must approve the arrangement.

### **Scheme of Arrangement**

A scheme has to be approved by a majority in number and 75% in value of the creditors.

	<p><b>Liquidations</b> The liquidator:</p> <p>must, within 14 days of appointment: advertise their appointment; file a notice of appointment with the Registrar; and serve notice on the Company</p> <p>must, within 21 days of appointment, hold a meeting of creditors</p> <p>take possession of, protect and realise the Company's assets; distribute the assets or the proceeds of their realisation to creditors; and distribute any surplus to the members</p> <p>provide to all creditors and the Registrar a final report</p> <p>Depending upon the nature of the assets and the adjudication of claims by creditors, the procedure can take from a few months to many years.</p> <p><b>Creditors' Arrangement</b> A proposal is made between creditors and the company. An interim supervisor is appointed (with notice to the Registrar). A creditors' meeting occurs to approve the arrangement. A supervisor is appointed (with notice to the Registrar) in order to implement the arrangement. Any modification of the initial proposal requires adjournment of the creditors' meeting.</p> <p>The time taken depends on the compliance and agreement of the creditors but can be relatively quick.</p> <p><b>Scheme of Arrangement</b> This is a three stage process: a Court hearing convening the creditors' meeting, followed by the creditors meeting and then a hearing to seek sanction by the Court. The process can be relatively quick, subject to the notice requirements for the meeting (usually not less than 14 days).</p>
<p><b>What is the effect upon control of the company and its assets during those procedures?</b></p>	<p><b>Liquidation</b> Upon appointment (by the members or the Court) the liquidator has custody and control of the assets of the company. The powers of the directors and members of the company cease, save for very limited exceptions.</p> <p><b>Provisional liquidation in aid of restructuring</b> The day-to-day management of the company is generally left to the directors and managers of the company, subject to the terms of a Court-approved protocol and the supervision of the provisional liquidator.</p> <p><b>Creditors' Arrangement and Scheme of Arrangement</b> The only effects are those agreed between the company and the creditors.</p>

	<p>Yes, if:</p> <ul style="list-style-type: none"> <li>• it does not have a registered agent</li> <li>• it fails to file any return, notice or document required to be filed under the Act</li> <li>• The Registrar is satisfied the company has ceased to carry on business</li> <li>• The Registrar is satisfied it is carrying on a business of the Virgin Islands without having such licence, permit or authority</li> <li>• it fails to pay its annual fee or any late payment penalty by the due date; or The Court considers it is just and equitable, or in the public interest, that it should be wound up</li> </ul>
	<p>Traditionally the BVI has essentially been a creditor friendly jurisdiction. The purpose of liquidation is to realise the company's assets and to make distributions according to the priority of creditors. It is not designed to rescue the company and there is no equivalent of Chapter 11 protection from creditors. However, the recent common law development in Constellation Overseas Ltd, permitting provisional liquidation in aid of restructuring, facilitates the restructuring of BVI companies and of multi-jurisdictional groups containing BVI companies.</p> <p>Additionally, both Creditors' Arrangements and Schemes of Arrangement can facilitate a permanent or temporary rescue of the business.</p>
	<p>A liquidator has the power to sell the business and assets of the company.</p> <p>Either a Creditors' Arrangement or a Scheme of Arrangement could include a proposal for sale.</p>

## Cross Border


	<p>Statutory recognition: the BVI can provide assistance to overseas appointees from designated “relevant” foreign jurisdictions, being: Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the USA. The BVI court will take into account:</p> <ul style="list-style-type: none"> <li>• the just treatment of all persons claiming in the foreign proceedings</li> <li>• protection of persons in the BVI who may have claims in the foreign proceedings</li> <li>• prevention of preferences and fraud</li> <li>• the need for ranking for foreign claimants to be in order with BVI claimants</li> </ul> <p>Comity</p> <p>Permissible orders are very wide:</p> <ul style="list-style-type: none"> <li>• restrain proceedings</li> <li>• delivery of property of the company to a foreign representative</li> <li>• co-ordinating BVI insolvency with foreign insolvency; or</li> <li>• authorising the foreign representative of any person who could be examined in BVI insolvency proceedings</li> </ul> <p>Common law recognition: the current BVI position is that common law assistance can be given to overseas appointees, but only to those from the "relevant" jurisdictions for the purposes of statutory recognition.</p>
	<ul style="list-style-type: none"> <li>• the BVI Court cannot grant any assistance that adversely affects setoff rights or the rights of preferential or secured creditors (without their consent)</li> <li>• under common law assistance, relief will only be granted that is available to the overseas appointee in their home jurisdiction and available at common law in the BVI</li> </ul>

	<p>No. Although Part XVIII of the Act contains provisions based on the UNCITRAL Model Law on cross-border insolvency, that Part has not been brought into force.</p> <p>The existence of a foreign insolvency process in respect of a BVI company does not prevent the BVI court appointing a BVI liquidator and, as a matter of common law, the BVI proceedings will be treated as the primary proceedings.</p>
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## Creditors

	<p><b>Movable property</b> Shares in a BVI company are the most commonly secured BVI asset. Typically an equitable charge will be taken over the shares with the title to the shares remaining with the chargor subject to a commercially agreed enforcement scenario.</p> <p><b>Immovable property</b> Land and other immovable property situated in the BVI is not an asset class that is typically the subject of security.</p>
	<ul style="list-style-type: none"> <li>• fees and expenses are payable out of the estate, subject to Court assessment</li> <li>• typically liquidator’s fees charged at market hourly rates. Rarely fixed as a percentage</li> </ul>

## Avoidance transactions

	<p>Potentially “voidable transactions” comprise:</p> <ul style="list-style-type: none"><li>• unfair preferences</li><li>• transactions at an undervalue</li><li>• voidable floating charges; and</li><li>• extortionate credit transactions</li></ul> <p>Other than extortionate credit transactions, the transaction must be an “insolvency transaction”: one entered into when the company is insolvent or which causes the company to become insolvent.</p> <p>The vulnerability period is:</p> <ul style="list-style-type: none"><li>• 2 years prior to the onset of insolvency for a ‘connected person’</li><li>• 6 months prior to the onset of insolvency for any other person; and</li><li>• 5 years in the case of extortionate credit transactions</li></ul> <p>“Onset of insolvency” = the date the application to appoint a liquidator was issued or the date the members’ resolution was passed.</p> <p>A “connected person” includes related companies, and directors and members of the company and related companies.</p>

## Contributions to the liquidation estate and liability of officers


	<p>Yes, in the case of:</p> <ul style="list-style-type: none"> <li>• delinquent officers: misapplication of assets, misfeasance or breach of duty</li> <li>• fraudulent trading: intention to defraud creditors or the company had some other fraudulent purpose</li> <li>• insolvent trading: director knew or ought to have known there was no reasonable prospect of avoiding insolvency (unless they also took every reasonable step to minimise loss to creditors)</li> </ul>
	<p><b>Delinquent officers</b> Possible orders against delinquent officers are:</p> <ul style="list-style-type: none"> <li>• to repay, restore or account for money or other assets Pay compensation; or</li> <li>• pay interest</li> </ul> <p><b>Fraudulent trading or insolvent trading</b> The Court may order the payment of a contribution to the company's assets.</p>
	<p><b>When a director has been convicted on indictment:</b></p> <ul style="list-style-type: none"> <li>• of an offence in connection with the promotion, formation, management or dissolution of a company that is or becomes insolvent; or</li> <li>• of an offence under the Act that related to a company that at any time becomes insolvent</li> </ul> <p><b>When the director:</b></p> <ul style="list-style-type: none"> <li>• had an order for fraudulent trading or insolvent trading made against them</li> <li>• is guilty of fraud in relation to an insolvent company or of any misfeasance or breach of duty to it as a director; or</li> <li>• in the opinion of the Court, conducted themselves as a director of an insolvent company (and other companies) in such manner as to make them unfit to be a director</li> </ul>

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## Key Contacts



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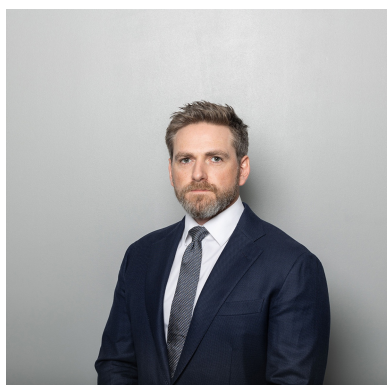
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